FILED
DEC 14 1953
HAROLD B. WILLEY, Clerk

No. 280

Supreme Court of the United States

OCTOBER TERM, 1953

PHILLIPS PETROLEUM COMPANY, *Petitioner*,

v.

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN, CITY OF DETROIT, MICHIGAN, CITY OF KANSAS CITY, MISSOURI, CITY OF MILWAUKEE, a municipal corporation, COUNTY OF WAYNE, MICHIGAN, and THE FEDERAL POWER COMMISSION, *Respondents*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

RAYBURN L. FOSTER
HARRY D. TURNER
Phillips Building
Bartlesville, Oklahoma

HUGH B. COX
Union Trust Building
Washington 5, D. C.
Attorneys for Petitioner

Supreme Court of the United States

OCTOBER TERM, 1953

No. 280

PHILLIPS PETROLEUM COMPANY, *Petitioner*,

v.

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN, CITY OF DETROIT, MICHIGAN, CITY OF KANSAS CITY, MISSOURI, CITY OF MILWAUKEE, a municipal corporation, COUNTY OF WAYNE, MICHIGAN, and THE FEDERAL POWER COMMISSION, *Respondents*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Phillips Petroleum Company prays that this Court grant a rehearing of its order of November 30, 1953, denying the petition for writ of certiorari filed herein on August 20, 1953, and further prays that upon rehearing a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case as prayed for in the petition.

REASONS FOR GRANTING A REHEARING AND ISSUING THE WRIT

1.

This is a test case, instituted and conducted as such, involving an important question concerning the interpretation of the Natural Gas Act, affecting thousands of independent producers of gas.[1] It is the first case to reach this Court squarely raising the question of the jurisdiction of the Federal Power Commission over *field sales* of natural gas in interstate commerce *by independent producers and gatherers.*

Since the passage of the Natural Gas Act in 1938 the Federal Power Commission has never asserted power to regulate such sales. In 1940 the Commission held that sales by such producers and gatherers were beyond its jurisdiction. *In the Matter of Columbian Fuel Corp.,* 2 F.P.C. 200. Compare *In the Matter of Billings Gas Co.,* 2 F.P.C. 288. In the course of rate proceedings instituted in 1943 against a natural gas company admittedly subject to the Act, certain statements made by the Federal Power Commission, and by a Circuit Court of Appeals which reviewed its order, were widely construed as casting doubt on the Commission's prior decision in the *Columbian Fuel* case. See *Interstate Natural Gas Co.* v. *Federal Power Commission,* 156 F. 2d 949 (5th Cir. 1946). This Court reviewed the decision of the Court of Appeals. The States of Texas and Oklahoma filed briefs *amici curiae* expressing concern lest the reasoning of the Court of Appeals lead to Federal regulation of field sales by independent producers and gatherers. Counsel for the Federal Power Commission denied that the result would follow, asserting that Interstate's sales were distinguishable from field sales by inde-

[1] By "independent" is meant those producers and gatherers who do not own or operate transmission lines and are not affiliated with any other company which owns or operates transmission lines.

pendent producers.[2] In its opinion this Court, referring to the *Columbian Fuel* and the *Billings* cases, said: "We express no opinion as to the validity of the jurisdictional tests employed by the Commission in these cases." *Interstate Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 691. Presumably the Court meant by this language to reserve decision upon facts like those in the *Columbian Fuel* case until it had such a case before it. This is such a case.

Clarifying legislation which excluded from regulation field sales of natural gas in interstate commerce by independent producers and gatherers was passed by Congress and was vetoed by the President in 1950. H.R. 1758, 81st Cong., 2d Sess. Subsequently, this Court again expressly reserved the question. *Cities Service Gas Co.* v. *Peerless Co.*, 340 U.S. 179, 188-189.

This case was deliberately instituted by the Commission to bring to final and authoritative decision the question of the extent of its jurisdiction. In its opinion in this case the Commission, after referring to the desirability of judicial review of its determination, said (R. 1749):

> "We would be greatly concerned if our decision were not so reviewable for we deem it of the utmost importance that there be an *early and conclusive answer* to the question whether we have erred in refraining from asserting jurisdiction over sales made in the process of production and gathering throughout the 13 years under the Natural Gas Act." (Italics supplied.)

The Commission, the industry generally and the affected producing states all assumed throughout the proceedings before the Commission, before the Court of Appeals and in the petition for certiorari in this case and in Nos. 281 and 418 that the basic jurisdictional question would here be decided. This Court by its Order of November 30, 1953, declined to review that question, thereby accentuating

---

[2] Brief of Federal Power Commission, pp. 26, 34, 40-41, in *Interstate Gas Company* v. *Federal Power Commission*, 331 U.S. 682.

rather than clarifying the confusing situation which has plagued the industry, the Federal Power Commission, state regulating authorities and the public generally. Petitioner respectfully submits that the petition should be reconsidered and granted.

2.

Because of the importance of the question presented in this case, it must be assumed that it will be raised again before this Court either in later stages of this proceeding or in other proceedings involving other independent producers or gatherers of natural gas. It may also be assumed that this Court does not believe that this basic jurisdictional question is too unimportant to deserve the attention of this Court and therefore should be committed permanently to the consideration of the lower Federal tribunals.

In these circumstances, we submit that this Court should grant a writ of certiorari at this time. The question decided by the Court of Appeals "is fundamental to the further conduct of the case" and for that reason should be reviewed by this Court now. *United States* v. *General Motors Corp.*, 323 U.S. 373, 377; *Land* v. *Dollar*, 330 U.S. 731, 734, Footnote 2; *Larson* v. *Domestic and Foreign Corporation*, 337 U.S. 682, 685, Footnote 3.

Certainly no public or private interest can be served by postponing this Court's consideration of the question until the conclusion of a long and laborious rate proceeding. Such a proceeding would develop no additional facts that would assist this Court in deciding the jurisdictional question; all the necessary facts were fully developed in extensive hearings before the Commission. On the contrary, delay in deciding the question will have serious adverse effects upon both the industry and the consuming public. During the several years that will ensue before this case is again ripe for review by this Court, the oil and gas producing industry will be in a state of confusion and doubt

due to the uncertainty of whether gas sales may be made to interstate pipe line companies without subjecting the seller to regulation as a natural gas company. A final and definitive decision by this Court is needed to remove this confusion and doubt.[3]

Although the distribution of gas through interstate pipe lines has expanded markedly since World War II, the demand by consumers far exceeds the available supplies.[4] Over 70 percent of the gas flowing through these pipe lines is produced by independent producers not heretofore regulated as a utility or deemed subject to the federal regulation.[5] It is axiomatic that producers will sell their gas in intrastate markets rather than to interstate pipe lines if the effect of sales to the latter may be to subject the seller to utility regulation under the Natural Gas Act. This means that independent producers will be loath to commit additional quantities of gas to interstate pipe lines and will be prone to discontinue existing sales to them wherever the opportunity is presented, as long as the doubt remains

---

[3] The judgment of the Court of Appeals is not such a final and definitive decision. Admittedly the order of this Court denying the petition for writ of certiorari adds nothing to the authority of the opinion of the Court of Appeals. This Court has repeatedly admonished the bar and litigants that a denial of a petition for a writ of certiorari cannot be taken as indicating any view on the merits of the case. *United States* v. *Carver*, 260 U.S. 482, 490; *House* v. *Mayo*, 324 U.S. 42, 48; *Brown* v. *Allen*, 344 U.S. 443, 456, 488, 492, 513, 543. Quite apart from this familiar principle it is not to be assumed that this Court would in any circumstances decide the merits of the important question presented in this case on a petition for a writ of certiorari and without a full hearing.

[4] *Natural Gas—Whoosh!* Fortune, December 1949, p. 107;
Economics of a Growth Industry, Business Week, September 26, 1953, pp. 85, 94;
The Outlook for Energy Sources, Vol. III, pp. 15, 19, Resources for Freedom (commonly referred to as the "Paley Report"), Government Printing Office, 1952.

[5] R. 728-731.

concerning their status under the Act.[6] In many instances producers will leave their gas in the ground, or where legally permissible (in the case of casinghead gas) pop it into the air rather than sell it into a market which may result in the regulation of the producer as a natural gas company.[7]

Moreover, it is clear that with the threat of Federal regulation hanging over them, producers of gas will curtail their expenditures for exploration, drilling, gathering and processing facilities. Independent producers have not voluntarily gone into the producing business, with the attendant hazard of entire loss of capital, with the expectation of having their profits, if any, limited by law to a 6 percent annual rate of return on their investment, such as customarily allowed natural gas companies, and it is highly improbable that they will continue to invest in a business where the status of a public utility may be thrust upon

---

[6] *Phillips Ruling to Mean Federal Control . . . But to What Extent?* The Oil and Gas Journal, December 7, 1953, pp. 68, 70;

Federal Control Can Flow Through Gas Lines, The Petroleum Engineer, September 1953, pp. A-37, A-51;

Economics of a Growth Industry, Business Week, Sept. 26, 1953, pp. 85, 98;

How Federal Regulation of Producers Works Against Consumers, Gas Age, May 8, 1952, p. 59;

Developments in the Law Relating to Natural Gas During 1952-1953, Public Utilities Fortnightly, Oct. 8, 1953, pp. 521, 527;

Views of the Gas Industry on Regulation, Public Utilities Fortnightly, May 7, 1953, p. 634;

Comment, 59 Yale L. J. 1468, 1490;

Natural Gas Investigation, Federal Power Commission, Docket G-580, Report of Commissioners Smith and Wimberly, U. S. Government Printing Office (1948), p. 170.

[7] *The Outlook for Energy Sources,* Vol. III, p. 22, Resources for Freedom (Paley Report), Government Printing Office, 1952;

Economics of a Growth Industry, Business Week, September 26, 1953, pp. 85, 98.

them.[8] This means a drastic reduction in new discoveries and production which are necessary to satisfy the expanding demand for natural gas,[9] the cleanest, the cheapest and the most desirable of all fuels available to the consuming public.[10] These factors will result in both physical and economic waste of gas and will seriously impair the conservation efforts of state regulatory authorities.[11]

In addition to these business and economic problems, the independent producers and gatherers who sell gas to interstate pipe lines are also faced with the question whether,

---

[8] Statistics show that under regulation the percentage of gas produced by natural gas companies has markedly declined. In 1940, the then eight major interstate pipe line companies produced, directly or through affiliates, over 47% of the gas which they sold. Since that date, although investments and sales have increased substantially, every major system constructed has relied almost entirely on purchased gas. By 1951, the production of the eight older companies had declined from 47.2% of their total requirements to 30.1%. In that year, these eight pipe lines, together with the seven major pipe lines constructed since 1940, produced only 18.5% of their total requirements. Concurring opinion of Commissioner Smith, In the Matter of Northern Natural Gas Company, Docket G-1618, Opinion No. 230, June 18, 1952, — F.P.C. ——. As Commissioner Smith stated, it is difficult to "believe that all this is due to coincidence, free from connection with the Commission's rate-making methods."

[9] Even without the artificial deterrent of the threat of regulation, exploration for gas will have to continue at an increasing rate in order to meet future demands. *Foundation for Growth and Security*, Vol. I, p. 111, and *The Outlook for Energy Sources*, Vol. III, p. 15, Resources for Freedom (Paley Report), Government Printing Office, 1952.

[10] *The Outlook for Energy Sources*, Vol. III, p. 19, Resources for Freedom (Paley Report), Government Printing Office, 1952.

Natural Gas—Whoosh! Fortune Magazine, December 1949, pp. 107, 108. The editors there refer to natural gas as "cheap at twice the price".

[11] R. 417-418, 472-473.

Federal Control Can Flow Through Gas Lines, The Petroleum Engineer, September 1953, pp. A-37, A-51.

Natural Gas Investigation, Federal Power Commission, Docket G-580, Report of Commissioners, Smith and Wimberly, United States Government Printing Office (1948), p. 170.

by reason of the interpretation of the statute adopted by the majority of the Court of Appeals, they must now voluntarily comply with the mandatory provisions of the Natural Gas Act requiring the filing of rate schedules, the obtaining of certificates of convenience and necessity for the construction and operation of facilities, the keeping of accounts and the making of periodic reports, or run the risk of the severe penalties provided by Section 21a of the Natural Gas Act.

3.

In their joint response to the petition for certiorari in No. 418 of this term, the respondents, for the first time, suggested that this case does not raise any general question of the application of the statute to sales made by independent producers and gatherers but turns simply on the peculiar nature of Phillips' operations.[12] There is no merit in this contention. The Commission's finding that Phillips' sales were made during the course of production and gathering was intended to be and is in effect a finding that Phillips' operations, despite their size, do not differ significantly in type of function from the operations of any independent producer and gatherer. It is beyond dispute that Phillips' sales of gas are made immediately upon the completion of

[12] Respondents' own arguments refute their contention. Respondents state in their response in No. 418 (p. 3) that the Power Commission found that Phillips engaged in (a) sales for resale in interstate commerce and (b) in transportation in interstate commerce, and then assert "both of which bring Phillips within the affirmative jurisdictional provisions of Section 1 (b)". Every producer who sells gas to interstate pipe lines, whether at the well head or elsewhere, is covered by (a) above. And since gathering necessarily involves movement of gas by pipe line (the only kind of transportation which the Commission found Phillips to be engaged in), every gatherer who delivers gas to an interstate pipe line is covered by (b) above. Thus, if respondents' arguments are correct, the decision of the majority of the Court of Appeals subjects to Federal regulation all independent producers and gatherers who sell gas to interstate pipe lines.

production and gathering, and are typical of hundreds of other sales not heretofore regarded as subject to Federal regulation. They are the same type of operation involved in the *Columbian Fuel* case upon which this Court reserved decision. The Court of Appeals itself regarded the case as raising the question of the general application of the statute to all such sales. That Court stated in the concluding passage of its opinion (R. 1865):

> "But the validity or invalidity of the Commission's conclusion that Phillips is not a 'natural gas company' *does not turn upon the evaluation of testimony or upon any facts peculiar to this case. It turns upon the generic question* whether the exemption of 'production or gathering' in § 1(b) of the Natural Gas Act covers interstate sales of gas by the corporation that produced and gathered it. We think the Act and the decisions of the Supreme Court permit only one answer. We think the Commission has applied an erroneous rule of law." (Emphasis supplied.)

4.

The decision of the Court of Appeals directly and substantially affects the producing states and their regulation of independent producers and gatherers in the interests of conservation. The widespread and legitimate concern of the states in this aspect of the decision is evidenced by a resolution passed by the Interstate Oil Compact Commission, whose members comprise 26 producing states, on December 5, 1953, after this Court's denial of the petition for writ of certiorari herein. That resolution, after referring to the decision by the Court of Appeals, recites that it is the opinion of the Interstate Oil Compact Commission that extension of Federal jurisdiction so as to permit "partial regulation of the production and gathering of natural gas will, as the Federal Power Commission found and stated as a fact, substantially interfere with state regulation of production and gathering of natural gas," and concludes by stating that the Commission calls "the seriousness of the

situation to the attention of its member states" and urges them "to take every step possible to secure the reversal of the aforesaid decree."

CONCLUSION

For all of the foregoing reasons Phillips Petroleum Company prays that this petition for rehearing be granted, and that upon rehearing its petition for writ of certiorari be reinstated and granted.

Respectfully submitted,

RAYBURN L. FOSTER
HARRY D. TURNER
Phillips Building
Bartlesville, Oklahoma

HUGH B. COX
Union Trust Building
Washington 5, D. C.
Attorneys for Petitioner

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

RAYBURN L. FOSTER
Phillips Building
Bartlesville, Oklahoma

HUGH B. COX
701 Union Trust Building
Washington 5, D. C.